west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0495
Fax: (304) 926-0463

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.wvdep.org

**ORDER**
**ISSUED UNDER THE**
**WATER POLLUTION CONTROL ACT**
**WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Mayor Ric Griffith
City of Kenova
Box 268
Kenova, WV 25530

DATE: July 23, 2012

ORDER NO.: 6770

## INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter "Director"), under the authority of West Virginia Code, Chapter 22, Article 11, Section 1 et seq. to the City of Kenova (hereinafter "Kenova").

## FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. On April 7, 2003, Kenova was registered under a Notice of Intent (NOI) for WV/NPDES General Permit No. WV0116025 (Small Municipal Separate Storm Sewer Systems, MS4), Permit Registration No. WVR030039.

2. On March 3, 2004, Kenova's counsel requested a waiver of the MS4 requirements on its behalf.

3. On March 5, 2004, the West Virginia Department of Environmental Protection (WVDEP)/Division of Water and Waste Management (DWWM) issued Administrative Order No. 5549 to Kenova. This Order established requirements for Kenova to undertake in support of its waiver request. The Order included language regarding Kenova's right to appeal the Order.

4. On April 5, 2005, WVDEP/DWWM sent correspondence to Kenova informing it that its request for waiver of the MS4 permit requirements was denied and directed it to submit a permit registration application within thirty (30) days.

5. On December 1, 2005, WVDEP/DWWM sent correspondence to Kenova requesting that it submit a complete site registration application within fifteen (15) days.

6. On January 3, 2006, WVDEP/DWWM received a partially completed MS4 site registration application.

7. On February 2, 2006, WVDEP/DWWM sent correspondence to Kenova requesting that additional information necessary to complete its application be submitted within thirty (30) days.

8. On March 9, 2006, WVDEP/DWWM received correspondence from Kenova which stated that it would take two to three years to complete its planned separation projects on its CSO system, after which it would be ready to implement the best management practices required by the MS4 program. Kenova's correspondence further stated that, "Full compliance by March 6, 2008 is not obtainable or acceptable to the City of Kenova."

9. On January 5, 2007, WVDEP/DWWM issued Administrative Order No. 6049 to Kenova. Order No. 6049 required Kenova to:

   a. Comply with the terms and conditions of its Notice of Intent.
   b. Within sixty (60) days of the effective date of this Order, submit a complete MS4 site registration application.
   c. Within twenty (20) days of WVDEP/DWWM approval of the site registration application, begin implementing the six (6) minimum controls.
   d. Within one (1) year of WVDEP/DWWM approval of the site registration application, submit a progress report to WVDEP/DWWM detailing the implementation of the six (6) minimum controls.

   Order No. 6049 included language regarding Kenova's right to appeal the Order.

10. Kenova did not comply with Administrative Order No. 6049, because it failed to comply with the terms and conditions of its NOI and submit a complete MS4 site registration application, a violation of Chapter 22, Article 11, Section 1 et seq. of the Code of West Virginia.

11. On February 12, 2008, WV/NPDES permit coverage was extended until September 30, 2008.

12. On September 10, 2008, WV/NPDES permit coverage was extended until March 31, 2009.

13. On March 5, 2009, WV/NPDES permit coverage was extended until June 30, 2009.

14. On June 18, 2009, WV/NPDES permit coverage was extended until September 1, 2009.

15. On June 22, 2009, WV/NPDES Water Pollution Control Permit No. WV0116025 was issued with an expiration date of July 22, 2014.

16. Kenova is listed in Appendix 6 of the Preamble of the Storm Water Phase II Final Rule (attached) as an operator of a small MS4, and so is subject to Code of Federal Regulation 40CFR122.32. Pursuant to the Code of Federal Regulations, because Kenova is designated as an operator of a small MS4, it shall be regulated under the WV/NPDES storm water program. Consequently, WV/NPDES permit coverage is required. Kenova, however, failed to renew its WV/NPDES permit registration; therefore, its activities are no longer covered under the WV/NPDES permit. Discharging pollutants from a point source into State waters without the required WV/NPDES permit is a violation of WV Legislative Rule 47CSR10 Section 3.1.

17. On May 31, 2012, WVDEP personnel and representatives of Kenova met to discuss the terms and conditions of this Order.

## ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 11, Section 1 et seq. of the West Virginia Code, it is hereby agreed between the parties, and ORDERED by the Director:

1. Kenova shall immediately take measures to initiate compliance with all pertinent laws and rules.

2. Within forty-five (45) days of the effective date of this Order, Kenova shall submit an administratively complete application for coverage under WV/NPDES Water Pollution Control Permit No. WV0116025. The application shall be submitted to:

**West Virginia Department of Environmental Protection**
**Division of Water and Waste Management-MS4 Program**
**601 57th Street SE**
**Charleston, WV 25304**

3. Because of Kenova's WV Legislative Rule violations, Kenova shall be assessed a civil administrative penalty of seven thousand four hundred seventy dollars ($7,470) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of entry of this Order. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall be mailed to:**

**Chief Inspector**
**Environmental Enforcement - Mail Code #031328**
**WV-DEP**
**601 57th Street SE**
**Charleston, WV 25304**

## OTHER PROVISIONS

1. Kenova hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, Kenova agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, Kenova does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding Kenova other than proceedings, administrative or civil, to enforce this Order.

2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.

3. If any event occurs which causes delay in the achievement of the requirements of this Order, Kenova shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after Kenova becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Kenova intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of Kenova (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Kenova of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Kenova to additional penalties and injunctive relief in accordance with the applicable law.

5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

6. This Order is binding on Kenova, its successors and assigns.

7. This Order shall terminate upon Kenova's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

Rickey W Griffith — 7-24-12

Hondrable Rickey W. Griffith
City of Kenova

Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

_____ _____

Scott G. Mandirola, Director
Division of Water and Waste Management

Date

*revised April 2009*

RECEIVED
AUG 6 2012
ENVIRONMENTAL
ENFORCEMENT

WI Allouez village
WI Altoona city
WI Appleton city
WI Ashwaubenon village
WI Bayside village
WI Bellevue town
WI Beloit city
WI Beloit town
WI Big Bend village
WI Black Wolf town
WI Blooming Grove town
WI Brookfield city
WI Brookfield town
WI Brown County
WI Brown Deer village
WI Brunswick town
WI Buchanan town
WI Burke town
WI Butler village
WI Caledonia town
WI Calumet County
WI Campbell town
WI Cedarburg city
WI Cedarburg town
WI Chippewa County
WI Chippewa Falls city
WI Clayton town
WI Combined Locks village
WI Cudahy city
WI Dane County
WI De Pere city
WI De Pere town
WI Delafield town
WI Douglas County
WI Dunn town
WI Eagle Point town
WI Eau Claire city
WI Eau Claire County
WI Elm Grove village
WI Elmwood Park village
WI Fitchburg city
WI Fox Point village
WI Franklin city
WI Germantown town
WI Germantown village
WI Glendale city
WI Grafton town
WI Grafton village
WI Grand Chute town
WI Green Bay city
WI Greendale village
WI Greenfield city
WI Greenville town
WI Hales Corners village
WI Hallie town
WI Harmony town
WI Harrison town
WI Hobart town
WI Holmen village
WI Howard village
WI Janesville city
WI Janesville town
WI Kaukauna city
WI Kenosha city
WI Kenosha County
WI Kimberly village
WI Kohler village
WI La Crosse city
WI La Crosse County
WI La Prairie town
WI Lafayette town
WI Lannon village
WI Lima town
WI Lisbon town
WI Little Chute village
WI Madison town
WI Maple Bluff village
WI Marathon County
WI McFarland village
WI Medary town
WI Menasha city
WI Menasha town
WI Menomonee Falls village
WI Mequon city
WI Middleton city
WI Middleton town
WI Monona city
WI Mount Pleasant town
WI Muskego city
WI Neenah city
WI Neenah town
WI Nekimi town
WI New Berlin city
WI North Bay village
WI Norway town
WI Oak Creek city
WI Onalaska city
WI Onalaska town
WI Oshkosh city
WI Oshkosh town
WI Outagamie County
WI Ozaukee County
WI Pewaukee town
WI Pewaukee village
WI Pleasant Prairie town
WI Pleasant Prairie village
WI Racine city
WI Racine County
WI Rib Mountain town
WI River Hills village
WI Rock County
WI Rock town
WI Rothschild village
WI Salem town
WI Schofield city
WI Scott town
WI Sheboygan city
WI Sheboygan County
WI Sheboygan Falls city
WI Sheboygan Falls town
WI Sheboygan town
WI Shelby town
WI Shorewood Hills village
WI Shorewood village
WI Somers town
WI South Milwaukee city
WI St. Francis city
WI Stettin town
WI Sturtevant village
WI Superior city
WI Superior village
WI Sussex village
WI Thiensville village
WI Turtle town
WI Union town
WI Vandenbrook town
WI Vernon town
WI Washington County
WI Washington town
WI Waukesha city
WI Waukesha County
WI Waukesha town
WI Wausau city
WI Wauwatosa city
WI West Allis city
WI West Milwaukee village
WI Weston town
WI Westport town
WI Wheaton town
WI Whitefish Bay village
WI Wilson town
WI Wind Point village
WI Winnebago County
WV Bancroft town
WV Barboursville village
WV Belle town
WV Benwood city
WV Berkeley County
WV Bethlehem village
WV Brooke County
WV Cabell County
WV Cedar Grove town
WV Ceredo city
WV Charleston city
WV Chesapeake town
WV Clearview village
WV Dunbar city
WV East Bank town
WV Follansbee city
WV Glasgow town
WV Glen Dale city
WV Hancock County
WV Huntington city
WV Hurricane city
WV Kanawha County
WV Kenova city
WV Marmet city
WV Marshall County
WV McMechen city
WV Mineral County
WV Moundsville city
WV Nitro city
WV North Hills town
WV Ohio County
WV Parkersburg city
WV Poca town
WV Putnam County
WV Ridgeley town
WV South Charleston city
WV St. Albans city
WV Triadelphia town
WV Vienna city
WV Wayne County
WV Weirton city
WV Wheeling city
WV Wood County
WY Casper city
WY Cheyenne city
WY Evansville town
WY Laramie County
WY Mills town
WY Natrona County

# Base Penalty Calculation

(pursuant to 47CSR1-6.1)

**Responsible Party:** City of Kenova **Receiving Stream:** Ohio River

**Treatment System Design Maximum Flow:** N/A **MGD**

**Treatment System Actual Average Flow:** N/A **MGD** (if known)

Enter FOF# and rate each finding as to Potential and Extent.

| 1) | Potential for Harm Factor | Factor Range | FOF# 16 | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| a) | Amount of Pollutant Released | 1 to 3 | 1 | | | | | | | | | | | | |
| b) | Toxicity of Pollutant | 0 to 3 | 1 | | | | | | | | | | | | |
| c) | Sensitivity of the Environment | 0 to 3 | 1 | | | | | | | | | | | | |
| d) | Length of Time | 1 to 3 | 3 | | | | | | | | | | | | |
| e) | Actual Exposure and Effects thereon | 0 to 3 | 1 | | | | | | | | | | | | |
| | **Average Potential for Harm Factor** | | 1.4 | No | No | No | No | No | No | No | No | No | No | No | No |
| 2) | **Extent of Deviation Factor** | **Factor Range** | | | | | | | | | | | | | |
| | Degree of Non-Compliance | 1 to 3 | 3 | | | | | | | | | | | | |

**Potential for Harm Factors:**

1)c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)

1)d - Length of Time of Violation

1)e - Actual Human/Environmental Exposure and Resulting Effects thereon

**Examples/Guidance:**

**Note:** Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Minor = exceedance of permit limit by <=40% for Avg. Monthly or <=100% for Daily Max., exceed numeric WQ standard by <= 100%, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by >= 41% and <= 300% for Avg. Monthly , >= 101% and <= 600% for Daily Max., exceed numeric WQ standard by >= 101% and <= of 600% or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by >= 301% for Avg. Monthly, >= 601% for Daily Max., exceed numeric WQ standard by >= 601%, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.

**Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.**

| 1) | Potential for Harm Factor | Factor Range | FOF# | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| a) | Amount of Pollutant Released | 1 to 3 | | | | | | | | | | | | | |
| b) | Toxicity of Pollutant | 0 to 3 | | | | | | | | | | | | | |
| c) | Sensitivity of the Environment | 0 to 3 | | | | | | | | | | | | | |
| d) | Length of Time | 1 to 3 | | | | | | | | | | | | | |
| e) | Actual Exposure and Effects thereon | 0 to 3 | | | | | | | | | | | | | |
| | **Average Potential for Harm Factor** | | No | No | No | No | No | No | No | No | No | No | No | No | No |
| **2)** | **Extent of Deviation Factor** | **Factor Range** | | | | | | | | | | | | | |
| | Degree of Non-Compliance | 1 to 3 | | | | | | | | | | | | | |

| | | Extent of Deviation from Requirement | | |
|---|---|---|---|---|
| | | Major | Moderate | Minor |
| Potential for Harm to Human Health or the Environment | Major | $8,000 to $10,000 | $6,000 to $8,000 | $5,000 to $6,000 |
| | Moderate | $4,000 to $5,000 | $3,000 to $4,000 | $2,000 to $3,000 |
| | Minor | $1,500 to $2,000 | $1,000 to $1,500 | Up to $1,000 |

| FOF # | Potential for Harm | Extent of Deviation | Penalty | Multiple Factor | Base Penalty |
|---|---|---|---|---|---|
| 16 | Moderate | Major | $4,400 | 1 | $4,400 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
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| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| Total Base Penalty | | | | | $4,400 |

# Penalty Adjustment Factors

(pursuant to 47CSR1-6.2)

**Penalty Adjustment Factor**

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase
6.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40 % maximum

6.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

6.2.b.7 - Public Interest (increase to be determined)

6.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

6.2.b.9 - Staff investigative costs (increase to be determined)

6.2.b.10 - Other factors

**Size of Violator: 0 - 50% decrease**

**NOTE:** This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employees or is part of a corporation that employees more than 100 individuals.

| Avg. Daily WW Discharge Flow (gpd) | % Reduction Factor |
|---|---|
| < 5,000 | 50 |
| 5,000 to 9,999 | 40 |
| 10,000 to 19,999 | 30 |
| 20,000 to 29,999 | 20 |
| 30,000 to 39,999 | 10 |
| 40,000 to 99,999 | 5 |
| > 100,000 | 0 |

**Additional Other factors to be determined for increases or decreases on a case-by-case basis.**

Public Notice Costs (cost for newspaper advertisement)
6.2.b.2 - Good Faith - 10% decrease to 10% increase
6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease
6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

# Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

| Penalty Adjustment Factor | % Increase | % Decrease | Base Penalty Adjustments |
|---|---|---|---|
| 6.2.b.1 - Willfulness and/or negligence - | 30 | | $1,320 |
| 6.2.b.4 - Compliance/noncompliance history | 25 | | $1,100 |
| 6.2.b.6 - Economic benefits - (flat monetary increase) | $1,500 | | $1,500 |
| 6.2.b.7 - Public Interest - (flat monetary increase) | | | $0 |
| 6.2.b.8 - Loss of enjoyment - (flat monetary increase) | | | $0 |
| 6.2.b.9 - Investigative costs - (flat monetary increase) | | | $0 |
| 6.2.b.10 - Other factors (size of violator) | | | $0 |
| 6.2.b.10 - Additional Other Factors - Increase (flat monetary increase) | | | $0 |
| 6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease) | | | $0 |
| Public Notice Costs (flat monetary increase) | $30 | | $30 |
| 6.2.b.2 - Good Faith - Increase | | | $0 |
| 6.2.b.2 - Good Faith - Decrease | | 10 | ($440) |
| 6.2.b.3 - Cooperation with the Secretary | | 10 | ($440) |
| 6.2.b.5 - Ability to Pay | | | $0 |
| **Penalty Adjustments** | | | **$3,070** |
| **Penalty =** | | | **$7,470** |

| Estimated Economic Benefit Item | Estimated Benefit ($) |
|---|---|
| Monitoring & Reporting | |
| Installation & Maintenance of Pollution Control Equipment | |
| O&M expenses and cost of equipment/materials needed for compliance | |
| Permit Application or Modification | $1,500 |
| Competitive Advantage | |
| **Estimated Economic Benefit** | **$1,500** |

**Comments:** Prepare a complete application/Storm Water Management Plan = $1,500.

RECEIVED
JUL 24 2012
BY:

dep

west virginia department of environmental protection

Environmental Enforcement
601 57th Street SE
Charleston, WV 25304
Telephone: (304) 926-0470 Fax: (304) 926-0488

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

July 23, 2012

Mayor Ric Griffith
City of Kenova
Box 268
Kenova, WV 25530

**CERTIFIED RETURN RECEIPT REQUESTED**
91 7199 9991 7031 5501 1173

**RE: Violation of Chapter 22, Article 11 of the WV State Code**

Dear Mr. Griffith:

Enclosed is 2nd revised CONSENT ORDER NUMBER 6770 dated July 23, 2012. This action is based upon the investigation and recommendation of the West Virginia Department of Environmental Protection's (WVDEP) Environmental Enforcement unit in response to City of Kenova violating Chapter 22, Article 11 of the WV State Code at its facility located in Kenova, Wayne County, West Virginia. This revision is based upon your meeting with WVDEP personnel. This administrative settlement is being offered on behalf of the director of the Division of Water and Waste Management.

Please review, sign and return the original copy of the revised ORDER to me within five (5) working days of receipt. Subsequently, WVDEP will initiate the public notice process.

Sincerely,

Michael A. Zeto
Chief Inspector

Enclosure
cc: Scott G. Mandirola, Director, DWWM (via e-mail)
Yogesh Patel, Asst. Director, DWWM/Permits
Joseph M. Hickman, Assistant Chief Inspector, EE/WW (via e-mail)
Jeremy Bandy, Assistant Chief Inspector, EE (via e-mail)
David C. Simmons, Enforcement Hearing Officer, EE (via e-mail)
Laura McGee, Environmental Resources Specialist, EE (via e-mail)
Cynthia Musser, Environmental Inspector Supervisor, EE/WW (via e-mail)
Shyrel Moellendick, MSSS, EE (via e-mail)

RECEIVED
AUG - 6 2012
ENVIRONMENTAL ENFORCEMENT

*revised September 2011*